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Friends of the Earth v. Crown Central Petroleum[1]: The Surrogate Enforcer Must Be Allowed to "Stand Up" for the Clean Water Act

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I. Introduction

This Case Note examines the doctrine of standing in light of the Fifth Circuit's decision in *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*[2] The decision in *Crown Central* deals with the doctrine of standing and whether the environmental organization, Friends of the Earth (FOE), met the requirements of standing necessary to bring a lawsuit under the Clean Water Act (CWA or Act). Here, FOE brought suit against Crown Central Petroleum alleging discharge and reporting violations under the CWA.[3] The Fifth Circuit held that plaintiffs, who use a waterway (a lake) approximately eighteen miles downstream from the defendant's point of discharge, did not adduce sufficient evidence to survive a motion for summary judgment because they did not meet the "fairly traceable" requirement of stand-

1. 95 F.3d 358 (5th Cir. 1996).

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2. 95 F.3d 358.

3. *Id.* at 360. *See generally* Federal Water Pollution Control Act of 1972 (CWA) §§ 101-521, 33 U.S.C. §§ 1251-1381 (1995).

ing established by the Supreme Court.[4] Generally, this Case Note will analyze the doctrine of standing as it applies to environmental cases brought under the CWA. More specifically, this Note will discuss whether the Fifth Circuit correctly interpreted the existing law regarding standing under the CWA and whether it rightfully denied standing to FOE.

Congress enacted the CWA, also known as the Federal Water Pollution Control Act of 1972, with the goal of "restor[ing] and maintain[ing] the natural chemical, physical, and biological integrity of the Nation's waters."[5] Congress realized the magnitude of such a program and the logistical problems in implementing it. As a result, it recognized the importance citizens could have in promoting the specific goals enunciated in the CWA, and gave them the statutory standing needed to bring suits against those who violate specific provisions of the Act.[6] Furthermore, Congress also decided that "[a] high degree of informed public participation in the control process is essential to the accomplishment of the objectives [of the Act,] . . . a restored and protected natural environment."[7]

Part II of this Case Note discusses the general background of the CWA, particularly the legislative history which outlines its goals and the role that citizens have in acting as its surrogate enforcers. Part II also discusses the doctrine of standing as it applies to plaintiffs in environmental cases. Although the plaintiffs benefit from a statutory grant of standing, they must first establish that they have met the Article III standing requirements under the United States Constitution, which require a showing of "distinct and palpable injury."[8] In addition, Part II presents the relevant statutory

4. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (enunciating the requirements for individual standing). Standing will be discussed in Part II of this Case Note.

5. S. REP. No. 92-414, 2, 10 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3676 [hereinafter S. REP. No. 92-414] (from a section entitled "Discussion of Intent").

6. CWA § 505, 33 U.S.C. § 1365.

7. *See* S. REP. No. 92-414, *supra* note 5, at 11.

8. *See* Warth v. Seldin, 422 U.S. 490, 501 (1975)(stating that once "this [Article III] requirement is satisfied, persons to whom Congress has granted a

sections of the Act that apply to *Crown Central*, specifically, section 505.[9]

Furthermore, Part II discusses the existing case law on standing used by the Fifth Circuit in arriving at its rather narrow and novel decision in *Crown Central*. It examines other cases, not relied upon by the Fifth Circuit, which address the requirements of establishing standing, and specifically, the "fairly traceable" requirement. This part will also present views opposing citizen suits and the fairly liberal standing requirements that courts have been applying in these cases.

Part III discusses the facts and the procedural history of *Crown Central*. Part III presents the holding of the Fifth Circuit and the method of reasoning that the court used in arriving at its fairly novel decision that the plaintiffs failed to establish standing.

Part IV of this Case Note analyzes the court of appeals decision in *Crown Central*, and establishes that it had no basis upon which to grant summary judgment in favor of the defendant. Furthermore, it also establishes that there was a genuine issue of fact to be determined at trial, namely, whether the discharge of Crown Central did in fact reach the waters, particularly Lake Palestine, that FOE stated were, or could eventually be, affected by the pollution discharged by the defendant. This Note argues that the Fifth Circuit did not have sufficient evidence to establish that defendant's discharge did *not* affect the waterways in which FOE claimed an interest.

Part V of this Case Note concludes that environmental organizations and citizens deserve an expanded doctrine of standing because of the great benefit that results for society. The surrogate enforcer should be allowed to stand up for the environment and in opposition to those who blatantly violate the laws without regard for the effects on the environment.

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right of action, either expressly or by clear implication, may have standing to seek relief on the basis of legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim").

9. CWA § 505, 33 U.S.C. § 1365.

II. Background

A. The Clean Water Act: The Intent Behind the Legislation

The Clean Water Act was introduced in 1972 in response to the ineffectiveness of prior legislation.[10] As the Senate Report indicated, "[t]he legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limit[ations]."[11] The change in policy was made because of "the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of a given stream quality."[12] The problem was that "[w]ater quality standards, in addition to their deficiencies in relying on the assimilative capacity of receiving waters, often cannot be translated into effluent limitations—defendable in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters."[13] Therefore, the ultimate goal of the CWA is to focus attention and resources on effluent limitation standards, that is, controlling the amount of pollution that an entity can discharge rather than attempting to control and

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10. *See generally* S. REP. NO. 92-414, *supra* note 5, at 10-12.

11. *Id.* at 7. *See also* Sharon Elliot, *Citizen Suits Under The Clean Water Act: Waiting For Godot in the Fifth Circuit*, 62 TUL. L. REV. 175 (1987) [hereinafter Elliot].

Sharon Elliot provides an excellent explanation of what "effluent limitations" mean in the context of the CWA:

> 'Effluent limitations' represent specific restrictions on discharges and limit the quantities, rates, and concentrations of substances that may be discharged from point sources. These limitations are usually expressed numerically, for example by the concentration of a discharged pollutant, and are meant to be applied to all point sources. A 'point source' means the point at which the pollutant-containing effluent is released. The industrial community refers to point sources at industrial plants as 'outfalls.' The Act authorizes the Administrator of the Environmental Protection Agency to establish effluent limitations for different categories of point sources.

Id. at 177-78.

12. *See* S. REP. NO. 92-414, *supra* note 5, at 7.

13. *Id.* at 7-8.

measure pollution when it has already entered the waterways.[14]

To effectively administer this new change in policy, the founders of the CWA also established a permit system. This system requires those who need to discharge pollutants into waterways to acquire permits that limit the amount of effluent.[15] These permits, also known as National Pollution Discharge Elimination System (NPDES) permits, require permitees to regularly sample their discharges and to perform standardized tests to determine the levels of pollutants being discharged into receiving waters and whether such discharge exceeds permit limits.[16] The Environmental Protection Agency (EPA) and agencies of states with federally approved discharge programs, are the only entities that may issue a permit.[17] Violators of permits may be subject to both civil and criminal liability.[18] Once these permit holders sample their discharges, they must then submit the results in the form of discharge monitoring reports (DMRs) to the proper authority.[19] These DMRs are made available to the public,[20] and can be used as evidence to establish discharge violations and reporting violations.[21]

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14. *Id.*

15. CWA § 482, 33 U.S.C. § 1342.

16. *See* Elliot, *supra* note 11, at 178. *See also* Theodore L. Garret, *Citizen Suits After Gwaltney*, C266 ALI-ABA 305 (1988) [hereinafter Garret].

17. *See* Garret, *supra* note 16, at 308.

18. *Id.*

19. *Id.*

20. *Id.* DMRs are discharge monitoring reports, that effluent dischargers have to maintain by law, which record the amount of effluent a particular company discharges, which is then given to the EPA and which are then ultimately made available to the public. *Id.*

21. *Id.*

> The discharge of any pollutant not complying with a NPDES permit violates the Act unless the Act itself otherwise authorizes it.
>
> NPDES permits also contain monitoring and reporting requirements, designed to make the permits enforceable. Permit holders must install monitoring equipment to regulate and sample their effluent, and keep records of the results, so that they can be reported as prescribed by the [EPA] Administrator. Such reports are called discharge monitoring reports (DMRs) and must be filed by the holder of each federal or state issued NPDES permit. The labora-

B. The Citizen and the Power to Bring Suit

Congress recognized the need for additional assistance in implementing and enforcing the goals of the Act.[22] Congress looked to the citizens, the ones most directly affected by the discharge of pollutants into the waterways, for assistance in implementing the CWA.[23] The Senate report clearly indicated that an "essential element in any control program involving the nation's waters is public participation."[24] As a result, Congress also made certain to include a "citizen suit" provision,[25] which allows anyone affected by a discharger's pollution to bring a civil suit against any person or entity that is alleged to be in violation of its NPDES permit.[26] The CWA also allows any person to bring a suit against the Administrator of the EPA for failure to perform an act that is required and "non-discretionary."[27] The legislative intent is to emphasize the importance of the citizen suit provision and to stress that "enforcement of these control provisions [must] be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them."[28] Section 505(a)(1) of the CWA empowers citizens to bring suits against polluters and provides in relevant part:

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tory results are used to prepare the DMRs. The DMRs are filed between one to three months after a sample is taken.

Elliot, *supra* note 11, at 180-81. *See also* Requirements for Recording and Reporting of Monitoring Results, 40 C.F.R. § 122.48 (1998).

22. *See* S. REP. NO. 92-414, *supra* note 5, at 7-11.

23. *Id.*

24. *Id.* at 69.

25. CWA § 505, 33 U.S.C. § 1365.

26. *See* S. REP. NO. 92-414, *supra* note 5, at 75. *See also* CWA § 505, 33 U.S.C. § 1365.

27. *See* CWA § 505, 33 U.S.C. § 1365. *See also* S. REP. NO. 92-414, *supra* note 5, at 75. It is clear that Congress intended that citizens have an essential role in enforcing the CWA, as is evident by the fact that they are even allowed to bring suit against the EPA Administrator, or any state administrator, who is not fulfilling his/her obligation under the CWA.

28. S. REP. NO. 92-414, *supra* note 5, at 76. *See also* Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory and the Agony of Defeat*? 15 WM. MITCHELL L. REV. 327, 329 (1989)(stressing the importance of the "unique enforcement mechanism," known as the citizen suit, that Congress has implemented in its attempt to eradicate water pollution under the CWA); Elliot, *supra* note 11, at 199 (highlighting the key role citizens have under the CWA and referring to such citizens as "private attorneys general").

> [a]ny citizen may commence a civil action on his own behalf—
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> (1) against any person (including the (i) United States and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) . . . alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect such a standard or limitation, or
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> (2) against the Administrator where there is an alleged failure of the Administrator to perform any act or duty which is not discretionary with the Administrator.[29]

The statute defines a "citizen" as "a person or persons having an interest which is or may be adversely affected."[30] It gives citizens a very unique and tremendous power to enforce violations of the CWA. The citizen suit provision, which was the result of a compromise between the House and the Senate,[31] has been the source of much debate and discussion.[32]

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29. CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).

30. *Id.* at § 505(g), 33 U.S.C. § 1365(g).

31. *See* Arthur G. Carine, III, *The Clean Water Act, Standing, And The Third Circuit's Failure to Clean Up The Quagmire: Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 4 VILL. ENVTL. L. J. 179 (1993)(explaining the debate that took place between the House and Senate on this specific provision).

This article explains, in relevant part, that:

> The citizen suit provision of section 505, intended to mirror the constitutional standing requirements set forth in *Sierra Club v. Morton*, was the result of compromise between the House of Representatives and the Senate. The House bill attempted to restrict standing to affected citizens within a local area or groups actively participating in the administrative process. In sharp contrast to the House proposal, the Senate bill permitted 'any person' to sue. In compromise form, section 505 of the Clean Water Act empowers to sue 'violators' . . . [and], a 'person,' [as] defined for purposes of the Clean Water Act, includes corporations and associations; consequently, environmental group plaintiffs qualify as citizens under the Clean Water Act.

Id. at 182.

32. *See generally* Stephen J. Driscoll, *Environmental Private Actions: Are Special Interest Groups Hobbling Comprehensive Programs Without "Standing" Themselves?*, 24 RUTGERS L.J. 469 (1993)(concluding that environmental groups and special interest groups hamper comprehensive governmental programs through extensive litigation); Mark S. Fisch, *The Judiciary Begins To Erect An-*

C. The Citizen Must Have Standing

Standing is a critical element in any environmental lawsuit. The key to success in most environmental law cases usually depends upon the plaintiff proving standing.[33] The courts play a critical role in determining whether or not a particular plaintiff has standing.[34] Roger Beers, in a course of study presented by the American Law Institute, stresses the important role that the doctrine of standing has played in environmental cases.[35] Beers points out that "there has been little consistency and considerable confusion in past judicial opinions regarding the elements of standing . . . ."[36] However, there have been several Supreme Court cases that have set forth a number of requirements and tests used in establishing standing on both an individual and an organizational basis.[37] EPA officials have stressed that "[r]egardless of the

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other Dam Against Citizen Suits Under The Clean Water Act, 22 STETSON L. REV. 209 (1992) (noting that the courts increasingly seem to be limiting the number of citizen suits brought by conducting a careful analysis of the standing requirements).

33. *See* Karl S. Coplan, *Private Enforcement Of Federal Pollution Control Laws—The Citizen Suit Provisions*, SA85/3 ALI-ABA 1033, 1041 (1996) [hereinafter Coplan] (identifying that there are only four cases where standing was denied and nearly 44 cases where standing was affirmed). Karl S. Coplan is an Associate Professor of Law and Co-Director of the Environmental Litigation Clinic at Pace University School of Law.

34. *Id.*

35. Roger Beers, *Standing and Related Procedural Hurdles In Environmental Litigation*, C127 ALI-ABA 1 (1995).

Beers states:

> In American Jurisprudence, the concept of 'standing to sue' is one aspect of the 'case or controversy' limitation on federal jurisdiction contained in Article III of the Constitution. While it thus cuts across every subject matter of litigation, it has rarely had the decisive role in shaping a body of law as it has had in the environmental field . . . . Indeed, standing to protect environmental interests is now so firmly entrenched that it is surprising to recall that less than twenty-five years ago few courts had opened their doors to the protection of anything but economic or property rights.

Id.

36. *Id.* at 4.

37. *See* Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41, n.16 (1972); Whitmore v. Arkansas, 495 U.S. 149, 159-61 (1990); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

theoretical considerations at issue, it is clear that Congress fashioned a distinct role for private enforcement under the Clean Water Act and that national environmental groups, among others, have seized the opportunity presented to them."[38]

Although it is clear that Congress has given citizens statutory standing to bring suit, it also requires them to establish that they have Article III standing.[39] This "enthusiasm [to bring suit] has led environmental organizations and citizens/plaintiffs to mistakenly believe they have standing to sue any time a discharge permit is violated."[40] However, there have been few cases where standing has been denied in environmental cases. Actually, the opposite is true; in most cases, standing has been quite readily recognized.[41]

D. The Supreme Court's Interpretation of the Standing Doctrine

Even where a plaintiff establishes standing as required by the statute, the plaintiff must also establish standing under Article III of the Constitution.[42] In many environmental cases, the plaintiff is an organization and therefore must meet the requirements set out in two separate tests established by the Supreme Court. The first test is set out in *Lujan v. Defenders of Wildlife*.[43]

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38. Courtney M. Price, *Private Enforcement Of The Clean Water Act*, 1 WTR NAT. RESOURCES & ENV'T 31 (1986) [hereinafter Price] (Courtney Price was, at the time the article was written, Assistant Administrator for the Enforcement and Compliance Monitoring sector of the EPA in Washington, D.C.).

39. *See* U.S. CONST. art. III, § 2, cl. 1-3. *See also* Allen v. Wright, 468 U.S. at 756 (articulating the elements of standing under Article III of the Constitution).

40. Patrick McDermott, *Environmental Groups, Aesthetic Injury, and Citizen Suits: Standing Takes A Stand Under PIRG v. Powell Duffryn Terminals*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 521, 532 (1992).

41. *See* Coplan, *supra* note 33, at 1041.

42. *See* U.S. CONST. art. III, § 2, cl. 1-3. *See also* Valley Forge Christian College v. Americans United For Separation of Church & State Inc., 454 U.S. at 464.

43. 504 U.S. 555, 560 (1992)(holding that environmental groups, which challenged a regulation of the Secretary of the Interior dealing with the Endangered Species Act and funds for projects that would harm animals, lacked standing). *See also* Coplan, *supra* note 33, at 1041-42 (stating that there seems

In *Lujan*, the Supreme Court reiterated a three-part test which established the "irreducible constitutional minimum" required for standing.[44] The Supreme Court stated the elements as follows:

> First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision.[45]

The Supreme Court also explained that "particularized" means that "the injury must affect the plaintiff in a personal and individual way."[46]

The plaintiff, in "invoking federal jurisdiction[,] bears the burden of establishing these elements."[47] The plaintiff must present enough proof as is required by the various stages of a lawsuit, such as the pleading stage, summary judgment phase, or trial stage.[48] Once these elements have been

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to be a "retrenchment in the earlier expansion of standing for citizens" as is evident by recent Supreme Court decisions in *Lujan II*, 504 U.S. 555, and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)).

44. *Lujan II*, 504 U.S. at 560.

45. *Id.* (citations omitted)

46. *Id.* at 561.

47. *Id.*

48. *Id.* at 561-62.

The Supreme Court explains the different evidence required by the successive stages of a lawsuit as follows:

> At the pleading stage, general factual allegation of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss 'we presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for the purposes of the summary judgment motion will be taken to be true. And at the

proven and the plaintiff meets his burden, standing will be established, but merely for the individual. However, as stated earlier, many plaintiffs are environmental organizations that seek to protect our Nation's waters.[49]

The Supreme Court has also established requirements which an organization must fulfill before it can bring suit against an alleged violator. The environmental organization must establish "associational standing," as first enumerated in the Supreme Court's decision in *Warth v. Seldin*,[50] and ultimately set forth as a three-part test in *Hunt v. Washington State Apple Advertising Commission*.[51] The Court in *Hunt* set forth a three-part test, based on the *Warth* decision, which stated that:

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final [trial] stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'

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Id. (citations omitted).

Federal Rule of Civil Procedure 56(c) provides that the summary judgment sought "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to an material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). *See also* Natural Resources Defense Council, Inc. v. Vygen Corp., 803 F. Supp. 97 (N.D. Ohio 1992) (quoting Celotex Corp. v. Catrett, 477 U.S. 317 (1986)); FED. R. CIV. P. 56(e).

49. *See* Price, *supra* note 38 and accompanying text.

50. 422 U.S. 490, 490 (1975).

The Supreme Court in *Warth* explained the theory behind the associational standing doctrine and stated that,

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to the proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 511 (citations omitted).

51. 432 U.S. 333 (1977).

> an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[52]

Therefore, an environmental organization bringing suit as a representative of one of its members, must make certain that the member on whose behalf it is suing has standing as an individual. In addition, the organization must establish the separate requirements needed for associational standing as elicited above.[53]

F. Cases Relied Upon by the Fifth Circuit In Its Analysis

1. *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*[54]

In *Powell Duffryn*, various environmental organizations brought suit against an effluent discharger under the CWA for violating its NPDES permit.[55] The defendant operated a bulk storage facility where it stored liquids from different companies which ultimately caused pollutants to be discharged into the Kill Van Kull in violation of its NPDES permits.[56] The plaintiff submitted affidavits of several members

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52. *Id.* at 343.

53. *Id.* The language of the first prong of the test developed in *Hunt* requires that an organization can only bring a suit on behalf of its members only if the members themselves are able to "sue individually" and therefore, must establish individual standing before organizational standing is established. *See* Hunt v. Washington State Apples Adver. Comm'n, 432 U.S. at 343. *See also* National Treasury Employees Union v. United States Dep't of Treasury, 25 F.3d 237, 241 (5th Cir. 1994); Save Our Community, Inc. v. United States Envtl. Protection Agency, 971 F.2d 1155, 1160 (5th Cir. 1992).

54. 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991).

55. *Powell Duffryn*, 913 F.2d at 65.

56.

> [Defendant], a New Jersey corporation, is an NPDES permit holder operating a large storage facility in Bayonne, New Jersey. This tank farm is located on land adjacent to the Kill Van Kull, a navigable body of water. [Defendant] uses the large tanks at the site to

each "stat[ing] that they are members of . . . the plaintiff organizations and reside in the vicinity of the Kill Van Kull."[57] These affidavits further indicated that certain members "hike, jog or bicycle along the shores of the Kill Van Kull"[58] while others "recreate in the Kill Van Kull Park, a public park located approximately two miles downstream of [defendant's discharge]."[59] Moreover, some of the members "indicated that they would boat, fish or swim there if the water were cleaner."[60] Nevertheless, the defendant, Powell Duffryn Inc., contended that the plaintiff did not meet the requirements of standing.[61]

In finding that the plaintiff did meet the requirements of standing, the Third Circuit set forth a detailed explanation of the elements of individual standing: injury-in-fact,[62] causation,[63] and redressability.[64] The court pointed out that the injuries set forth in the affidavits were sufficient to satisfy the injury-in-fact prong. It stated, quoting the Supreme Court,[65] that "harm to aesthetic and recreational interests is sufficient to confer standing."[66] The court also further indicated that "[t]hese injuries need not be large, 'an identifiable trifle'[67] will suffice."[68]

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store various liquids owned by others. These liquids include petroleum products and industrial chemicals. When liquids are transferred [to the others], some spillage occurs. The spillage mixes with rainwater and the run-off pollutes the Kill Van Kull.

Id. at 68.

57. *Id.* at 71.
58. *Id.*
59. *Id.*
60. *Id.* at 68.
61. *Id.*
62. *See Lujan II*, 504 U.S. at 560.
63. *Id.*
64. *Id.*
65. *See* Sierra Club v. Morton, 405 U.S. at 727.
66. *Powell Duffryn*, 913 F.2d at 71.
67. *Id.* (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973)).
68. *See* Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57 (2d Cir. 1985) (establishing injury where a member of an environmental organization passes by a body of water and is offended by the way it looks); *see also* Public Interest Research Group of N.J. v. New Jersey Expressway Auth., 822 F.Supp. 174 (D.N.J. 1992)(determining that the smell of the affected waterways and the

The Third Circuit also addressed the second element of standing—the "fairly traceable" prong. The defendant argued that its effluent had such a negligible effect on the affected waterway, as supported by expert testimony,[69] that it could not have possibly caused the injury alleged by the plaintiff. The Third Circuit held that "the requirement that the plaintiff's injuries be 'fairly traceable' to the defendant's conduct does not mean that the plaintiff must show to a scientific certainty that defendant's effluent alone caused the precise harm suffered by the plaintiffs."[70] Furthermore, the court stated that "[a] plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment."[71] The court held that, in order to prove that a plaintiff's harm is "fairly traceable" to the defendant's discharges, a plaintiff must "only show that there is a 'substantial likelihood' that the defendant's conduct caused the plaintiff's harm."[72] The Third Circuit then set forth three requirements necessary to establish "substantial likelihood," by stating:

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members refusal to fish in these waters were enough to establish injury-in-fact); Save Our Community v. United States Envtl. Protection Agency, 971 F.2d 1155 (5th Cir. 1992) (establishing injury-in-fact where the aesthetic and recreational interests of members of an environmental organization living near wetlands polluted by defendant, were affected).

69. *Powell Duffryn*, 913 F.2d at 71-72 (finding that an engineering consultant's testimony that "to a reasonable scientific certainty . . . [Powell Duffryn's] operation [did] not adversely affect water quality in the Kill Van Kull," except in a most "speculative and theoretical way," was insufficient to establish that plaintiffs did not suffer any injury).

70. *Id.* at 72.

71. *Id.*

72. *Id.* (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc. 438 U.S. 59, 75 (1978)). *See also* Robert Wiygul, *Gwaltney Eight Years Later: Proving Jurisdiction and Article III Standing In Clean Water Act Citizen Suits*, 8 TUL. ENVTL. L. J. 435, 451 (1995)(stressing that the three-part test established in *Powell Duffryn* has been widely adopted by many courts for determining whether the plaintiff's injury is fairly traceable to the defendant's discharge).

Many circuit courts, including the Fifth Circuit, have adopted the three-part test established by the *Powell Duffryn* court. *See* Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 57 (1996); Save Our Community v. United States Envtl. Protection Agency, 971 F.2d at 1155; Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc., 2 F.3d 493 (3d Cir. 1993); Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974 (4th Cir. 1992).

> In a Clean Water Act case, this likelihood may be established by showing that a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiff's have an interest that is or may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.[73]

However, it is essential to point out that the Third Circuit realized that a plaintiff alleging merely an exceedance of a permit requirement is not enough to establish this causation element.[74] The court explained that the plaintiff must show, through the use of publically available DMRs,[75] that the type of pollutants that defendant discharges cause the types of harms alleged by the plaintiff.[76]

The third element of redressability "is closely related to the 'fairly traceable' element."[77] The Third Circuit explained that "[w]hile the fairly traceable element focuses on the connection between the defendant's conduct and the plaintiff's injury, the redressability factor focuses on the connection between plaintiff's injury and the judicial relief sought."[78] This element addresses the issue of whether the relief, if granted by the court to the plaintiff, will redress the problem, which in this case is pollution of a waterway. The court stated that if relief were granted, such as the award of civil penalties or the grant of an injunction, it would deter the defendant from violating its permit, thereby reducing the amount of pollution in the Kill Van Kull.[79] Although the Third Circuit effectively

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73. *Powell Duffryn*, 913 F.2d at 72. The court further explains in footnote 8, that:

> In many of these [CWA] cases, there are several parties discharging into the affected waterway. In order to obtain standing, plaintiffs need not sue every discharger in one action, since the pollution of any one may be shown to cause some part of the injury suffered. The size of the injury is not germane to the standing analysis.

Id., n.8 (citation omitted).

74. *Id.* at 72-73.

75. *See supra* note 19 and accompanying text; *see also* 40 C.F.R. § 122.48.

76. *Id.*

77. *Powell Duffryn*, 913 F.2d at 73.

78. *Id.*

79. *See id.*

explained what is required to show injury-in-fact, causation, and redressability, this Case Note will focus on the "fairly traceable" or causation requirement as set forth by the Third Circuit in interpreting various Supreme Court decisions.

2. *Sierra Club v. Cedar Point Oil Co.*[80]

The Fifth Circuit in *Cedar Point* adopted the three-part test that the Third Circuit established in *Powell Duffryn*. *Cedar Point* also involved an environmental organization bringing suit against an oil company which discharged produced water into Galveston Bay in Texas and violated NPDES permit requirements under the Clean Water Act.[81] Several members of the Sierra Club stated in their affidavits, that they used portions of the Bay "for various recreational activities, including swimming, canoeing, and bird watching."[82] They stated that they were familiar with produced water and its effects, and were "concerned that the continued discharge of produced water [would] impair [their] ability to enjoy the activities in which [they] participate."[83] In this case, only one of the three affiants was actually engaged in activities near the discharge site. The other two affiants did not actually go near the site.[84] Defendant argued that the "concern" expressed by the members was not sufficient to support injury-in-fact.[85]

The Fifth Circuit in *Cedar Point* further added to the standing analysis in its decision. The court held that whether the "affiants were 'concerned' or 'believed' or 'knew to a moral certainty' that produced water would adversely af-

80. 73 F.3d at 546-79.

81. *Id.* at 546. The court in *Cedar Point* defined "produced water" as follows:

> Produced water originates as source water trapped in underground geological formations with oil and gas. When a well is drilled into a formation, the extraction of oil and gas also brings the water to the surface. During extraction, chemicals used in the drilling process become mixed with the water. The result is produced water.

Id. at 550.

82. *Id.* at 556.

83. *Id.*

84. *See id.*

85. *Id.* at 556.

fect their activities on the bay is [a] semantic distinction that makes little difference in the standing analysis."[86] The court further stated:

> The requirement that a party demonstrate an injury-in-fact is designed to limit access to the courts to those 'who have a direct stake in the outcome,' as opposed to those who would convert the judicial process into 'no more than a vehicle for the vindication of the value interest of concerned bystanders.'[87]

Moreover it pointed out that "[a]ll of the affiants expressed fear that . . . produced water *will* impair their enjoyment of these [recreational] activities because these activities are dependant upon good water quality."[88] It also stressed "[t]hat this injury is couched in terms of future impairment . . . [and] is of no moment. The Supreme Court has expressly held that 'a threatened injury' will satisfy the 'injury in fact' requirement for standing."[89]

The Fifth Circuit also addressed the "fairly traceable" prong of the standing test, and adopted the three-part test set forth in *Powell Duffryn*.[90] The court held that in order to meet the "fairly traceable" requirement, there is no need for "scientific certainty"[91] and that it is "sufficient for Sierra Club to show that Cedar Point's discharge of produced water contributes to the pollution that impairs [a member's] use of the bay."[92] Therefore, it is enough that the plaintiff shows that

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86. *Id.*

87. *Id.* (quoting United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 687 (1973) (citations omitted)).

88. *Id.* (emphasis added).

89. *Id.* (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472).

90. *Id.* at 557 (citing *Powell Duffryn*, 913 F.2d at 72). *See infra* Part II.F.1 (presenting the elements of the "fairly traceable" test).

91. *Cedar Point*, 73 F.3d at 558. *See also Save Our Community*, 971 F.2d at 1161 (quoting *Powell Duffryn*, 913 F.2d at 72); Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (reemphasizing that the plaintiffs are not required to establish the fairly traceable element through scientific certainty).

92. *Cedar Point*,73 F.3d at 558. *See also* Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 980.

the pollution discharged is of the type that causes the specific harm alleged.

3. *Friends of the Earth, Inc. v. Chevron Chemical Co.*[93]

This case directly addressed the "fairly traceable" requirement and whether causation can be proven when the affected waterway is far down stream from the point of the discharge. In this case, the defendant was issued a NPDES permit which allowed it to discharge into Round Bunch Gully, which flowed into the Cow Bayou, then into Sabine River and ultimately into Sabine Lake.[94] Sabine Lake is where the plaintiffs resided and where they claim the harm had been realized.[95]

The defendant in this case argued that there was no measurable effect of their discharge on the waterway in question. It offered the following expert testimony:

> Chevron's discharge could have no measurable or observable effect on the water quality of Sabine Lake . . . . Chevron's maximum effluent discharge is 0.17% of the flow into Sabine Lake . . . . The exceedingly small contribution of Chevron's effluent to the inflow of Sabine Lake makes it clear that this discharge has no measurable or observable impacts on the water quality in Sabine Lake.[96]

The district court, in holding that this evidence did not refute plaintiff's standing, stated:

> It is true that Defendant does not discharge directly into Lake Sabine; rather, Defendant's discharge flows into Round Bunch Gully, into Cow Bayou, into the Sabine River, which empties out into Sabine Lake and the Gulf of Mexico . . . . While there are intermediary bodies of water between Defendant's plant and Sabine Lake, Defendant's discharge will eventually spill into Sabine Lake . . . [which]

93. 900 F. Supp. 67 (E.D. Tex. 1995).
94. *Id.* at 70.
95. *See id.* at 75.
96. *Id.*

> is somewhere between two and four miles [away]. The distance between these two points is not so great and the interaction is not so tenuous that this court cannot find that Plaintiff's interest in Sabine Lake will be unaffected by Defendant's [discharge].[97]

Therefore, in viewing the different bodies of water as connected and ultimately as part of one continuous waterway, the district court seemed to set forth a test in helping to establish the fairly traceable element. The court indicated that although the distance (between the discharge point and an affected waterway) does matter, one must also look at the interaction between the various bodies of water which are linked to one another and which flow into each other.[98]

III. *Friends of the Earth v. Crown Central Petroleum Corp.*[99]

A. Facts and Procedural History

Members of the environmental organization, Friends of the Earth, who "birdwatch[ed] and fish[ed] at a lake some 18 miles and three tributaries from the source of the unlawful water pollution," brought suit against Crown Central Petroleum for discharge violations under the CWA.[100] FOE alleged that its members "reside in the vicinity of, or own property or recreate in, on or near the waters of Black Fork Creek, Prairie Creek, Lake Palestine, the Neches River, and the Neches River basin and tidally related waters affected by [defendant's] allegedly unlawful conduct."[101] The complaint was substantiated by three different affidavits from members who had joined the organization immediately before or right after FOE filed its complaint with the court.[102] FOE alleged that

97. *Id.*
98. *See id.*
99. *Crown Central*, 95 F.3d at 358.
100. *Id.* at 359.
101. *Id.*
102. *See id.* at 359-60. None of these three members were with the organization when the 60-day notice letter was sent to the defendant. *See id.* at 360.

since the "waterway"[103] into which the defendant discharged was part of the same waterway, and ultimately flowed downstream into Lake Palestine, the causal connection should be satisfied.[104]

The district court held that the plaintiff lacked standing because, the single affiant, who was a valid member at the time the lawsuit was initiated, did not suffer an injury-in-fact.[105] The district court further held that even if the plaintiff did suffer injury, the injury itself was not fairly traceable to the defendant's conduct.[106] Plaintiff appealed its dismissal to the Fifth Circuit.[107]

B. Holding and Reasoning

The Fifth Circuit concluded that FOE did not satisfy the "fairly traceable" element, and affirmed the district court's decision granting summary judgment in favor of Crown Central Petroleum.[108] The Fifth Circuit did not entirely rely on the decision handed down by the district court.[109] Rather, the Fifth Circuit in *Crown Central* only addressed the "fairly traceable" requirement of standing.[110]

The Fifth Circuit held that FOE did not meet the "fairly traceable" element of standing. The court did not address the issues regarding the "injury-in-fact" requirement or the "redressability" requirement established in prior cases.[111]

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103. FOE alleged that Crown Central discharges pollution into Black Fork Creek, which flows into Prairie Creek, which flows into the Neches River, and which ultimately flows into the Lake Palestine. *See id.* at 359.

104. *See id.* at 361.

105. *Id.* at 360.

106. *See id.*

107. *Id.* at 358.

108. *Id.*

109. *See* Friends of the Earth v. Crown Central Petroleum Corp., No. 94-CV489, 1995 U.S. Dist. LEXIS 16338 (E.D. Tex. 1995).

110. *Crown Central*, 95 F.3d at 358. "The district court found for [Crown Central Petroleum] on the first two elements[,]" which include[d] the fact that the plaintiffs have " . . . suffered an actual or threatened injury[,] [and that] the injury will likely be redressed if it prevails in the lawsuit." *Id.* However, the Fifth Circuit stated that it would not address these elements because it "conclude[d] that plaintiffs fail on the requirement that the injury be 'fairly traceable' to [Crown Central's] discharges." *Id.* at 360.

111. *Id.* at 360-61.

The court stressed the fact that the point of discharge was eighteen miles away, but did not conclude that was indeed "too far" and not part of the same waterway.[112] Rather, it assumed that even if it were part of the same "waterway," it was "too large to infer causation."[113] The Fifth Circuit stated that "[i]n short, FOE and its members relied solely on the truism that water flows downstream and inferred therefrom that any injury suffered downstream is 'fairly traceable' to the unlawful discharges upstream."[114]

The court of appeals simply held that "common sense" would require more proof, such as water samples or expert testimony (rather than simply the affidavits of these members stating that they are affected by discharges eighteen miles away).[115] The Fifth Circuit further stated that "[a]t some point this common sense observation becomes little more than surmise. At that point certainly the requirements of Article III are not met."[116]

The court did not make an attempt to establish or define a "point" at which standing can no longer be established. The court's decision is very vague. The Fifth Circuit, emphasizing the "narrow" scope of its holding, stressed that it was not "impos[ing] a mileage or tributary limit for plaintiff's proceeding under the citizen suit provision of the CWA."[117] Rather, the court stated that plaintiffs located "far downstream from the source of unlawful pollution may satisfy the 'fairly traceable' element by relying on alternative types of evidence."[118] The court further explained that FOE *could have* "produce[d] water samples showing that the presence of a pollutant of the type discharged by the defendant upstream"[119] or introduced expert testimony establishing that the pollution upstream contributed to a "perceivable effect" on the water the plaintiff

112. *Id.*
113. *Id.*
114. *Id.* at 361.
115. *Id.* at 361-62.
116. *Id.*
117. *Id.* at 362.
118. *Id.*
119. *Id.*

used downstream.[120] In summary, although the plaintiff may have been affected by the defendant's discharge, the court determined that the plaintiff should have produced additional types of evidence to establish that the harm was fairly traceable to the defendant.

IV. Analysis

The Fifth Circuit in *Crown Central* seems to have created a new requirement for establishing the "fairly traceable" prong of the standing analysis. The Fifth Circuit denied standing to FOE because it did not present scientific evidence that the defendant's discharge ultimately reached the waters alleged to be affected by the discharges. The Fifth Circuit held that the distance was too far to infer causation, and required either expert testimony or scientific proof that the defendant's discharge affected Lake Palestine. Additionally, the court in *Crown Central* did not find that Lake Palestine was not part of the affected waterway; rather, it assumed that it was part of the same waterway.[121] On this basis, the court granted the defendant's motion for summary judgment.

Existing case law consistently stresses that the plaintiffs do not have to establish to a scientific certainty that the defendant's discharge is adversely affecting the waterway in question.[122] Relying on the language of the *Crown Central* court's decision, "plaintiffs *may* produce water samples . . . or rely on expert testimony,"[123] it is clear that this language is permissive and does not *require* that such types of evidence be produced at such a preliminary stage of the lawsuit in order to establish standing. Case law also clearly indicates that a plaintiff does not have to show that any harm has yet to occur.[124] Rather, a plaintiff can simply state that harm may occur and that future impairment is sufficient to establish in-

120. *Id.*

121. *Id.* at 361.

122. *See supra* note 62 and accompanying text. *See also supra* Part II.F.1 (stating that scientific certainty not required to prove causation in summary judgment stage).

123. *Crown Central*, 95 F.3d at 362 (emphasis added).

124. *See Warth v. Seldin*, 422 U.S. at 490.

jury.[125] Therefore, FOE should have been given the opportunity at trial to produce the additional evidence required to prove that the defendant's discharge did reach the Lake Palestine and could eventually cause future harm.

It is critical to point out that the parties were at a preliminary stage in the lawsuit—the summary judgment stage.[126] Additional evidence could have been introduced at trial to establish the scientific proof necessary to determine whether or not defendant's discharges did reach Lake Palestine. During the summary judgment phase, there must be no genuine issue of fact present in order for the judge to grant summary judgment against the non-moving party.[127] During the summary judgment phase, the non-moving party is required to set forth specific facts "by affidavit or other evidence," which will be taken as true for the purposes of summary judgement.[128] If any genuine factual issues are raised, then summary judgment should be denied and the case must proceed to trial.

Here, FOE submitted affidavits of three members stating that they were adversely affected by the defendant's discharge. The affidavits presented by FOE must then be supported at trial with additional evidence if they are controverted by the defendant.[129] The defendant could have then presented evidence establishing that the pollution in the affected waterway does not consist of the same pollution the

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125. *See id.*

126. In reviewing summary judgment motions,

> [a] [c]ourt must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. A fact is 'material' only if its resolution will affect the outcome of the lawsuit. Determination of whether a factual issue is 'genuine' requires consideration of the applicable evidentiary standards. Thus, in most civil cases the court must decide 'whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict.'

Natural Resources Defense Council, Inc. v. Vygen Corp., 803 F. Supp. at 100.

127. *See supra* note 44 and accompanying text. *See also Lujan II*, 504 U.S. at 562 (indicating that summary judgment will be granted when there is no genuine issue of fact to decide upon); FED. R. CIV. P. 56(e).

128. *See supra* note 47 and accompanying text. *See also* FED. R. CIV. P. 56(e).

129. *See supra* note 44 and accompanying text.

plaintiff alleged it discharged. Therefore, there existed a genuine issue of fact to be adduced at trial: whether the pollutant of the type that the defendant discharges is present in Lake Palestine.

Furthermore, there was never any mention of the existence of another entity or company that was located between the point of discharge and Lake Palestine that could have been responsible for discharging similar pollutants, thereby severing the causal relationship. These are all factual issues that should have been presented at trial so that the trier-of-fact could have decided whether the defendant's discharge adversely affected Lake Palestine. Parties must be allowed to present expert testimony and additional scientific evidence at trial, at which point a judge or jury can determine whether or not there is enough proof to establish that the defendant's discharge pollutes the waterway.

The Fifth Circuit simply determined, without ultimately deciding that the distance was too far, that the eighteen mile distance could not allow a trier-of-fact to infer causation without more evidence. However, in arriving at its decision, the Fifth Circuit did not seem to apply any of the elements of the test created by the *Powell Duffryn* court establishing the "fairly traceable" element of the standing test.[130] The *Powell Duffryn* test requires a plaintiff to show that the defendant discharged excessive pollutants into a waterway in which the "plaintiffs have an interest or [which] may be adversely affected by the pollutant and that the pollutant causes or contributes to the [types] of injuries" that FOE and its members alleged.[131] The court of appeals in *Powell Duffryn* further explained that no matter how negligible the effect of the defendant's discharge is on a particular body of water, it can still be regarded as an injury.[132] Under this test, an "identifiable tri-

130. *See supra*, Part II.F.1 (presenting the "fairly traceable" test presented in *Powell Duffryn*).

131. *Crown Central*, 95 F.3d at 358, 360-61 (quoting *Powell Duffryn*, 913 F.2d at 77).

132. *See Powell Duffryn*, 913 F.2d at 71.

fle" is enough to claim injury.[133] Here, FOE clearly alleged more than an "identifiable trifle;" it alleged 344 NPDES Permit violations.[134] Therefore, the first prong of the fairly traceable test was, in fact, satisfied.

Furthermore, the Fifth Circuit, in assuming that Lake Palestine was part of the same waterway as Black Fork Creek,[135] conceded that Crown Central Petroleum discharged run-off into a waterway in which the plaintiff had an interest. Therefore, the second prong of the "fairly traceable" test also seemed to clearly be satisfied.

Finally, the court did not even address the third prong of the test. The third prong deals with the issue of whether the pollutants discharged by Crown Central Petroleum caused or contributed to the kinds of injuries suffered by the plaintiff. Here, the pollutants discharged by the defendant clearly contributed to the legally recognized aesthetic injuries alleged by FOE and its members,[136] ultimately satisfying the third prong of the test.

The plaintiff should have been granted standing to sue Crown Central because it established that the harm that they have suffered or could eventually suffer was "fairly traceable" to the defendant's discharge. Here, the Fifth Circuit required that the plaintiff prove its injury before they ever got to trial. It is the trier-of-fact that should decide whether the defendant has injured the plaintiff. A judge or jury, as the trier-of-fact, should have been allowed to decide whether the plaintiff was injured (or will be injured) by the defendant's pollution only after all of the evidence has been presented, after all of the expert witnesses have taken the stand and after all of the scientific tests have been analyzed. It seems that the Fifth Circuit has proclaimed that lawsuits should never go to trial; rather, they should all be disposed of at the summary judgment phase. The Fifth Circuit has effectively restricted the

133. *See supra* note 58 and accompanying text (explaining what constitutes an "identifiable trifle").

134. *Id.*

135. *Crown Central*, 95 F.3d at 361.

136. *See supra* Part III.A.

ability of an environmental organization to bring suit against a defendant who is clearly polluting the waterways.

V. Conclusion

It is important that citizens and environmental organizations be given the necessary power and leeway to enforce the Clean Water Act. Congress has specifically given citizens an important and critical role in enforcing environmental laws through citizen suit provisions. Under these provisions, a citizen must have standing before he can bring suit against a discharger and must meet the aforementioned standing requirements. It is clear that the government has limited resources, and has recognized the need for the assistance of citizens and environmental organizations in protecting the environment.

However, the Fifth Circuit in *Crown Central* denied FOE and its members the right to protect the environment by bringing suit against polluters who were clearly discharging great quantities of pollutants into our Nation's waters in violation of the CWA. The defendant violated its permit limits 344 times and discharged great quantities of pollution into the waterway. The courts should have allowed the case to proceed to the trial stage in order to determine the issue of whether the pollution reached and, in turn, affected Lake Palestine. If, at trial, the plaintiff could not establish that the types of pollutants that the defendant discharged were present in the body of water in question, then, and only then, should the judge take it upon him/herself to state that there is no causation and that this particular plaintiff has not been, nor will be, affected by this particular defendant.

The plaintiff had no reason, other than to protect the environment, for bringing this lawsuit. The money that the defendant pays goes to the government—it does not go to the plaintiff.[137] Citizens and environmental organizations do not

137. One could argue that these environmental organizations are just creating work for themselves and, ultimately, their attorneys are the ones who benefit (monetarily) from these lawsuits. However, the lawyers in most cases will not bring frivolous lawsuits in light of the sanctions the courts could impose on them for doing so. *See* FED. R. CIV. P. 11(c).

get any direct payment of money from this type of lawsuit. Rather, the only benefit they get is that the defendant is hopefully deterred from polluting the waterway in the future. The surrogate enforcer must be allowed to stand up for the environment and the courts must be open to their role as private attorneys general.